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# Public Sector Union Legislative Toolkit

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**“It is impossible to bargain collectively with the government.”**

- Franklin D. Roosevelt

Prepared by: The ALEC Commerce, Insurance and Economic Development Task Force

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## Public Sector Unions: A Brief History

While many are familiar with private sector unions and their creation during the labor movement at the turn of the 20<sup>th</sup> century, public sector unions are much newer. While postal workers were the first government employees to unionize, President Franklin D. Roosevelt said in 1937 that compensation for federal employees should be set by Congress and the President, not through bargaining and unions. Just a few decades later in 1962, President John F. Kennedy signed Executive Order 10988 to recognize the right of federal employees to collectively bargain.

Since then, states have taken it upon themselves to allow for public sector unionization. Unlike private unions, state government labor organizations are excluded from the National Labor Relations Act. This essentially creates monopoly bargaining laws where employees, despite being in a right-to-work state, are forced to accept a union as their exclusive bargaining representative in the workplace.

### What is *Janus v. AFSCME*?

In 1977, the Supreme Court decided the case of *Abood v. Detroit Board of Education*. This decision stated that a union shop can be maintained in a public workplace. While non-members would not be forced to pay union dues, the court deemed that they would still be required to pay agency fees to cover collective bargaining and administration. This precedent was challenged in 2016 in the case of *Friedrichs v. California Teachers Association* but before the court could issue a decision, Justice Antonin Scalia died and a 4-4 tie vote left in place the decision from the Ninth Circuit Court of Appeals. The *Janus v. AFSCME* case was originally started in 2015 but was placed on hold pending the decision of *Friedrichs v. California Teachers Association*. With no outcome, the *Janus* case was restarted with a new complaint filed after the appointment of Justice Neil Gorsuch in 2017. Oral arguments were heard on February 26, 2018 and a decision was delivered just months later on June 27<sup>th</sup> in favor of Mark Janus.

### What does the Supreme Court Decision mean?

The Court's 5-4 decision overturned the *Abood* precedent which allowed public sector unions to require employees to pay agency fees. While many states were quick to become compliant in removing agency fee payers from automated deductions, liberty-oriented organizations do not believe solely exempting agency fee payers is in full compliance with the law. Because workers cannot waive a right they did not know they had, the entire premise that employees have opted into a union pre-*Janus* is null and void. This standard requires that states remove all public

sector union members and agency fee payers despite any previous signatures or proof of membership from before the *Janus* decision. This places the burden on unions to go out and resolicit individuals to obtain “affirmative consent.” Lastly, Supreme Court decisions do not correct laws going forward; they serve to explain how the law should have been all along. Therefore union dues or agency fees collected before the Janus Decision are now also in question.

In conclusion, the landmark *Janus* decision now allows police officers, teachers, firefighters and other government employees the freedom to choose for themselves if joining a union or paying agency fees is in their best personal interest.

## The *Janus* Decision Strategy:

### Litigation Efforts around the Nation

#### [Liberty Justice Center](#)

It was the long, hard work of the Liberty Justice Center and the National Right to Work Legal Defense Foundation representing Mark Janus that lead to the pivotal Supreme Court decision overturning a 41-year precedent. Based in Chicago, the Center has been defending local right-to-work laws and other freedoms like: renting homes through Airbnb, discriminatory laws against in-car advertising for transit networking companies, and parity in campaign finance laws.

#### [The Buckeye Institute](#)

Although based in Ohio, the Buckeye Institute recently racked up the [first post-Janus wins](#) in Maine and Minnesota. The plaintiffs were both members of union organizations with very short opt-out windows within the university system. Upon being sent letters, the universities released both members immediately. This serves as a major victory and acceptance that not only agency fee payers, but union members themselves should be opted out after the *Janus* decision this past June.

#### [The Commonwealth Foundation](#)

Based in Pennsylvania, the Commonwealth Foundation has long been involved in labor issues by tracking public sector labor laws in all 50 states with its publication, [“Transforming Labor.”](#) The Foundation also has a legal arm to support efforts where states or unions are falling short to comply with *Janus*.

#### [The Freedom Foundation](#)

The Freedom Foundation performs litigation, grassroots education and advocacy. Its efforts will include taking on states with strong public sector unions on the West

Coast such as Washington, Oregon and California. With [80 canvassers](#), the organization is educating workers about their rights and pursuing litigation various state labor-related issues.

### **The National Right to Work Legal Defense Foundation**

After the *Janus* decision was made, the National Right to Work Legal Defense Foundation sent letters to 20 states and the District of Columbia without right-to-work laws that requested that they immediately stop collecting agency fees or face civil rights action. The organization has also attached a new court filing to an existing [class-action lawsuit](#) which requests \$100 million be refunded to 40,000 current and former California state employees from as far back as 2012. “Claw back” fee lawsuits like this will show how the *Janus* decision is interpreted by the courts.

### **What to look for in *Janus* Legislative “Workarounds”**

Several public sector unions saw a potential Mark Janus victory on the horizon after Justice Neil Gorsuch was confirmed and the case complaint was refiled in 2017. They immediately took action in legislatures around the country to seek ways to make it harder to leave public sector unions. As of this writing, there are [196 known Janus related bills in 12 states](#). While few have passed, these bills vary in scope and legality but all work toward strengthening public sector union influence and denying workers basic education about their rights in the workplace. Here are some things to look for in “workaround” bills:

#### 1. Paid time off for union activities

Bills like [SB 1085 in California](#) allow union members to do union business on work time and they are deemed to be on leaves of absence. There is no loss of benefits or compensation and when they come back to work, they are entitled to a position without the loss of rank, seniority or classification.

#### 2. Keeping public sector employees in the dark about their rights

[AB119](#), which is already law in California, allows government unions to access the personal information of workers. [A.3686](#) in New Jersey mandates captive audience meetings for all new public sector workers. In addition, [AB 2970](#) allows unions to keep new employee orientation information away from public disclosure. In New York, Erie County adopted a similar resolution allowing unions to access employee information, but barring outside group from obtaining that same information.

### 3. Dictating or restricting public employer speech in any way

Unions like to support legislation that restricts what an employer can say to employees concerning whether or not they may join a union. This was introduced this January in Washington via [SB 6082](#).

### 4. Changing definitions of “public employee” or “public employer”

The goal of pieces of legislation like California's [AB1603](#) is to include people who are jointly employed by a public agency and another employer at specific clinics and hospitals. [AB2017](#) expands the definition to include the Judicial Council. This allows the union to grow its ranks by increasing its prospects.

### 5. Shortened opt-out windows

Unions have worked to make the opt-out process as difficult as possible. Workers that know their rights still have to figure out how to navigate the process.

Legislation in New Jersey [A. 3686](#) shortened the allowed opt-out period to 10 days on the anniversary of an employee's start date and required a written notice to the public employer.

### 6. Subverting the *Janus* decision altogether

States friendly to Big Labor are figuring out how to remove union dues collection from the process altogether. Instead of using member dues to pay for collective bargaining, unions want the state to pay them directly bypassing the public employees' paychecks and a member opt-in process. In Hawaii, the first attempt was in 2016 with HB 1866 and a 2017 bill, [HB923](#) is still active for 2018.

## Five ALEC Model Policies for Your State

While it is imperative to watch states where anti-*Janus* legislation is popping up, being proactive to promote worker freedom is equally important. ALEC currently has 18 model policies for public sector union reform on the books with two pending. Below are the five that will be most effective to usher in reforms for your state.

## 1. The Public Employee Rights and Authorization Act

This policy reaffirms and clarifies the *Janus* decision. In addition, it helps to prevent public employees from being misled into forfeiting free speech rights and suffering financial losses.

## 2. Union Recertification Act

This policy ensures that no collective bargaining representative shall represent public employees in a unit without the concurrence of a majority of all the public employees in the unit. A commission will recertify a representative in a secret ballot election within three years of this act being passed and every even year thereafter.

## 3. The Public Employee Choice Act

This policy establishes the workers' right to opt out of union representation and represent themselves, as well as allowing unions to forego representation of workers who do not pay dues or fees. It does not change the rubric of collective bargaining in any other way except that, under the act, a worker has the choice to either remain in a union that has achieved majority consent from the employees in the unit or to fully and independently represent themselves.

## 4. Right to Work Act

This policy provides that no employee need join or pay dues to a union, or refrain from joining a union, as a condition of employment. It also establishes penalties and remedies for violations of its provisions.

## 5. The Public Employee Bargaining Transparency Act

This policy opens public-sector collective bargaining sessions and documents to the public.

## Places where Public Sector Employees Can Opt Out

Because there are so many types of public sector unions across the nation, learning about individual rights can be tricky. Below are a list of organizations and sites that educate workers while also giving them the tools they need to clearly indicate to their unions that they wish to opt out of paying agency fees or union dues.

[Americans for Fair Treatment](#) – Based in Pennsylvania, this organization offers public servants in various professions a robust education on workers' rights with links to support for information or litigation needs.

[CT Workers](#) – This group offers opt-out programming for public sector workers in Connecticut. In addition, they provide a helpful FAQ section to bring workers up to speed on the *Janus* decision.

[Educated Teachers](#) – Focused on teachers in the state of Minnesota, this site has video programming along with sample letters as to how to opt out. They even link back to My Pay, My Say for other Minnesota public sector workers.

[Leave My Union](#) – For the state that started it all, Leave My Union has a list of unions from Illinois. It includes opt-out letters for both the employer and the union.

[My Janus Rights](#) – This is the official site of the National Right to Work Legal Defense Foundation, and it serves workers who need legal aid in challenges related to the *Janus* decision.

[My Pay, My Say](#) – Started by the Mackinac Center in Michigan, My Pay, My Say serves public sector workers in all 50 states and allows them to create an opt-out letter unique to their state that can be sent directly to the union.

[Nevada Teacher Choice](#) – This organization, which helps teachers opt out of unions in Nevada, seeks to connect people into a greater community related to workers' rights.

[New Choice NY](#) – This site is extremely robust because it lists unions with a pull down menu for each county in the state of New York. After filling in the relevant information, the organization will also send a letter directly to the employer.

[Opt Out Today](#) – Run by the Freedom Foundation with a focus on Washington State, this site lists some of the biggest public sector unions in the state and runs an active campaign on Facebook as well.

[Stand With Workers](#) – The Liberty Justice Center represented Mark Janus in the case but they know that's just the beginning. With litigation efforts all over the state of Illinois, they cover just about any issue concerning individual rights and freedoms.

[Teacher Freedom](#) – This site is a consortium for all 50 states when it comes to educating teachers on their rights and offering sample letters on how to opt out.

[Workers Choose](#) – A project of the Buckeye Institute, this site allows one to opt out of any union based on a county search that covers the entire state of Ohio.

## ALEC Issue Briefings for Fall 2018



1. Ohio
2. Pennsylvania
3. New Jersey
4. New Hampshire
5. Illinois

## Contacts

Not sure where to start? Interested in scheduling an issue briefing in your state?  
For assistance and help in developing your own Janus Campaign, contact us  
below!

**Robert Ordway**

Director, CIED  
American Legislative Exchange Council  
2900 Crystal Drive, Suite 600  
Arlington, VA 22202  
Cell: (219) 718-9123  
Direct: (571) 482-5010

**Michael Slabinski**

Policy Analyst, CIED  
American Legislative Exchange Council  
Direct: (571) 482-5047

**Vinnie Vernuccio**

Policy Advisor  
State Policy Network  
Direct: (607) 437-0482

**Lindsay Killen**

VP for Strategic Outreach and Communications  
Mackinac Center  
140 W Main St  
Midland, MI 48640  
Office: (989) 631-0900  
Direct: (989) 698-1917